

Exhibit A



CAITLIN HULL
Attorney
(612) 492-6773
FAX (612) 677-3299
hull.caitlin@dorsey.com

November 29, 2018

VIA EMAIL

Jason Rudie
Office of the Chief Counsel
Midwest District
U.S. Department of Veterans Affairs
Minneapolis, MN 55417
Jason.Rudie@va.gov

Re: Touhy Request for Dr. Lindsay Andrews-Wiebusch and Ms. Megan Welu,
United States v. Kelvin Baez, Case No. 17-135 (ADM/KMM) (D. Minn)

Dear Mr. Rudie:

I write to submit a *Touhy* request on behalf of Kelvin Baez, the defendant in a currently-pending criminal matter in the District of Minnesota, *United States v. Kelvin Baez*, Case No. 17-135 (ADM/KMM) (D. Minn). Trial is set to begin in Minneapolis on December 10, 2018, and is expected to last three to five days.

In the pending criminal matter, Mr. Baez faces charges for drug-related crimes, including charges of possession with intent to distribute. As part of his defense, Mr. Baez intends to show that he has long struggled with substance abuse stemming from his post-traumatic stress disorder ("PTSD"), but was merely a drug user—not involved in any conspiracy to distribute.

The testimony of Dr. Lindsay Andrews-Wiebusch and Ms. Megan Welu are crucial to establishing this defense. After speaking with both potential witnesses, we have identified the following anticipated topics of testimony:

- Dr. Andrews-Wiebusch is a psychologist and counselor at the Minneapolis VA who provided Mr. Baez with cognitive processing therapy related to his PTSD from 2017-2018. Dr. Andrews-Wiebusch will testify that Mr. Baez has been diagnosed with PTSD stemming from military combat experience, and that his history of substance abuse played a role in that diagnosis.
- Ms. Welu is a clinical social worker at the Minneapolis VA who provided Mr. Baez with individual and group treatment for his substance abuse disorder from 2017-2018. Ms. Welu will testify that Mr. Baez has been diagnosed with substance abuse disorder stemming from his use of methamphetamine, cocaine, and opioids, and that staff has connected the disorder to his PTSD.



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Dr. Andrews-Wiebusch and Ms. Welu would both testify in their personal capacities as treatment providers to Mr. Baez. We would anticipate each witness to testify for no longer than one hour.

The *Touhy* factors favor the VA permitting both Dr. Andrews-Wiebusch and Ms. Welu to serve as witnesses in this criminal matter:

- a. **The need to avoid spending the time and money of the United States for private purposes and to conserve the time of VA personnel for conducting their official duties concerning servicing the Nation's veteran population:** The United States is a party to this matter, and indeed *initiated* this case against Mr. Baez. As such, the requested testimony is not for any “private” purpose. Regardless, however, the time and money involved in Dr. Andrews-Wiebusch and Ms. Welu providing testimony would be minimal. Both providers are based in Minneapolis, where the trial is taking place. The testimony is expected to last no more than one hour, and preparation time would be minimal. Moreover, Mr. Baez has a fundamental constitutional right to compel witnesses to testify on his behalf in a criminal matter.
- b. **How the testimony or production of records would assist VA in performing its statutory duties:** The VA is tasked with the duty to provide health care services and benefits to former military personnel, including Mr. Baez. Moreover, a “core value” of the VA includes providing “advocacy” for veterans: “VA employees will be truly veteran-centric by identifying, fully considering, and appropriately advancing the interests of veterans and other beneficiaries.” 38 C.F.R. § 0.601. The testimony of Dr. Andrews-Wiebusch and Ms. Welu would provide just that—advocacy for a veteran who sought and received treatment for his service-connected health care needs.
- c. **Whether the disclosure of the records or presentation of testimony is necessary to prevent the perpetration of fraud or other injustice in the matter in question:** The testimony of Dr. Andrews-Wiebusch and Ms. Welu is necessary to prevent injustice to Mr. Baez in a pending criminal case related to drug use. Without such testimony by his VA treatment providers, Mr. Baez would be left with no way to introduce evidence of his diagnoses and treatment, short of Mr. Baez taking the stand himself. Denial of a request for testimony under these circumstances would thus be manifestly unjust and deny Mr. Baez of his constitutional rights to not incriminate himself, to confront his accusers, and to compel witnesses to testify on his behalf.
- d. **Whether the demand or request is unduly burdensome or otherwise inappropriate under the applicable court or administrative rules:**



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This request is neither unduly burdensome or otherwise inappropriate under the applicable court or administrative rules.

- e. **Whether the testimony or production of records, including release in camera, is appropriate or necessary under the rules of procedure governing the case or matter in which the demand or request arose, or under the relevant substantive law concerning privilege:** Testimony of treating physicians is often-admitted evidence relating to drug use, and any patient-doctor privilege would be appropriately waived by Mr. Baez, the privilege holder, prior to testimony.
- f. **Whether the testimony or production of records would violate a statute, executive order, regulation or directive:** The requested testimony would not violate any law, order, regulation, or other directive.
- g. **Whether the testimony or production of records, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified pursuant to applicable statutes or Executive Orders:** The requested testimony would not reveal any classified information.
- h. **Whether the testimony would interfere with ongoing law enforcement proceedings, compromise constitutional rights, compromise national security interests, hamper VA or private health care research activities, reveal sensitive patient or beneficiary information, interfere with patient care, disclose trade secrets or similarly confidential commercial or financial information or otherwise be inappropriate under the circumstances:** The requested testimony would not interfere with ongoing law enforcement proceedings or reveal confidential information. To the contrary—the testimony would reveal only information Mr. Baez has authorized disclosure of, and would protect Mr. Baez’s constitutional rights not to take the stand in his own criminal proceeding, confront his accusers, and compel witnesses to testify on his behalf.
- i. **Whether such release or testimony reasonably could be expected to result in the appearance of VA or the Federal government favoring one litigant over another:** The requested testimony is not reasonably expected to result in the appearance that the VA—a federal agency—favors Mr. Baez over the Federal Government.
- j. **Whether such release or testimony reasonably could be expected to result in the appearance of VA or the Federal government endorsing or supporting a position advocated by a party to the proceeding:** The requested testimony is not reasonably expected to result in the



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appearance that the VA endorses federal drug crimes. To the contrary—the testimony will demonstrate the resources that the VA provides to treat veterans with substance abuse issues.

- k. **The need to prevent the public's possible misconstruction of variances between personal opinions of VA personnel and VA or Federal policy:** The requested testimony will not result in the misconstruction of the basis of each witness's testimony. Rather, it will be clear that each witness testifies on her own behalf as Mr. Baez's treating physician.
- l. **The need to minimize VA's possible involvement in issues unrelated to its mission:** As described above, advocating for veterans is part of the VA's core values. As such, treating physicians testifying in a drug trial regarding a patient's drug use is related to the VA's mission.
- m. **Whether the demand or request is within the authority of the party making it:** As a criminal defendant, veteran, and patient of both Dr. Andrews-Wiebusch and Ms. Welu, Mr. Baez has authority to make this request for testimony.
- n. **Whether the demand or request is sufficiently specific to be answered:** As outlined above, this request is specific and limited in scope.

As such, Mr. Baez respectfully requests that the VA grant this *Touhy* request and permit Dr. Andrews-Wiebusch and Ms. Welu to testify in the above-captioned criminal matter during the week of December 10, 2018.

Because of the fast-approaching trial date, Mr. Baez requests your prompt attention and resolution of this request. Please call me at 612-492-6773 if you have any questions.

Regards,

DORSEY & WHITNEY LLP

/s/ *Caitlin L.D. Hull*

Caitlin L.D. Hull

CLDH:

cc: RJ Zayed, Dorsey & Whitney
Michael Dovel, VA Office of General Counsel
Jon Power, Minneapolis VA Privacy Officer

Exhibit B

Hull, Caitlin

From: Hull, Caitlin
Sent: Wednesday, January 2, 2019 8:50 AM
To: 'Dovel, Michael E. (OGC)'
Cc: Zayed, RJ; 'Power, Jon'; 'Rudie, Jason (OGC)'
Subject: RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

Importance: High

Hi Michael,

We really need to know your response to this Touhy request today. Trial is set to begin in less than a week—on January 7—and a motion to compel, if necessary, needs to be filed as soon as possible.

Assuming the request is granted, we would expect Dr. Wiebusch and Ms. Welu to testify later in the day on January 9 or sometime on January 10. Again, the trial is in Minneapolis.

Please let us know where you are at as soon as possible, either via email or calling me back at 612-492-6773.

Thanks,

Caitlin L.D. Hull

Attorney

P: 612.492.6773 F: 612.677.3299 C: 952.406.2981
WWW.DORSEY.COM :: [MINNEAPOLIS](#)

From: Hull, Caitlin
Sent: Thursday, December 27, 2018 11:42 AM
To: 'Dovel, Michael E. (OGC)' <Michael.Dovel@va.gov>
Cc: Zayed, RJ <zayed.rj@dorsey.com>; Power, Jon <Jon.Power@va.gov>; Rudie, Jason (OGC) <Jason.Rudie@va.gov>
Subject: RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

Hi Michael,

We are still waiting for a response, with trial set to begin in less than two weeks (on January 7). Can you please issue your response as soon as possible, so we can take appropriate action if necessary (*i.e.*, move to compel)?

Thanks much, and I hope you have had a lovely holiday season!

Caitlin L.D. Hull

Attorney

P: 612.492.6773 F: 612.677.3299 C: 952.406.2981
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From: Dovel, Michael E. (OGC) <Michael.Dovel@va.gov>
Sent: Thursday, December 6, 2018 1:13 PM
To: Hull, Caitlin <hull.caitlin@dorsey.com>

Cc: Zayed, RJ <zayed.rj@dorsey.com>; Power, Jon <Jon.Power@va.gov>; Rudie, Jason (OGC) <Jason.Rudie@va.gov>
Subject: RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

No need to submit a request with a new date, at this point.

I will be responding shortly.

Michael Dovel
Dept of VA, Office of General Counsel
Midwest District
708-202-2216

From: Rudie, Jason (OGC)
Sent: Thursday, December 06, 2018 7:35 AM
To: hull.caitlin@dorsey.com
Cc: zayed.rj@dorsey.com; Power, Jon <Jon.Power@va.gov>; Dovel, Michael E. (OGC) <Michael.Dovel@va.gov>
Subject: RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

Michael, what say you?

From: hull.caitlin@dorsey.com [<mailto:hull.caitlin@dorsey.com>]
Sent: Wednesday, December 05, 2018 12:39 PM
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Cc: zayed.rj@dorsey.com; Power, Jon <Jon.Power@va.gov>; Dovel, Michael E. (OGC) <Michael.Dovel@va.gov>
Subject: [EXTERNAL] RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

Hello Jason and Michael,

I wanted to reach out regarding the status of this *Touhy* request, and to inform you that the trial has been continued to January 7, 2019. Please advise if we need to submit a new *Touhy* request letter reflecting this trial date.

Best,

Caitlin L.D. Hull

Attorney

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Subject: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request
Importance: High

Hello Jason and Michael,

Please see the attached *Touhy* request for the testimony of Dr. Lindsay Andrews-Wiebusch and Ms. Megan Welu in the above-captioned matter.

Because trial is fast-approaching on **December 10, 2018**, we appreciate your prompt attention to this matter.

Best,

Caitlin L.D. Hull

Attorney



DORSEY & WHITNEY LLP

Suite 1500, 50 South Sixth Street | Minneapolis, MN 55402-1498

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Please help reduce paper and ink usage. Print only if necessary.

Exhibit C

Hull, Caitlin

From: Hull, Caitlin
Sent: Wednesday, January 2, 2019 5:52 PM
To: 'Dovel, Michael E. (OGC)'
Cc: Zayed, RJ; 'Rudie, Jason (OGC)'
Subject: RE: U.S. v. B_____ -- Touhy Request

Hi Michael,

Thank you for your response. Respectfully, however, it seems as though you misinterpret what Dr. Andrews-Wiebusch would be testifying about, particularly in the context of a criminal case in which the United States is a party.

Dr. Andrews-Wiebusch would testify from her *personal knowledge* regarding Mr. Baez's PTSD diagnosis and treatment. RJ Zayed and I also spoke with Dr. Andrews-Wiebusch, who explained that she has not only reviewed Mr. Baez's medical records, but also personally administered diagnostic PTSD testing on Mr. Baez. Dr. Andrews-Wiebusch's involvement as Mr. Baez's diagnosing physician is crucial to his defense, both to authenticate the medical records and provide additional insight into the specific testing that she personally performed on Mr. Baez. To suggest that a separately-retained expert be retained less than a week out from trial is not a reasonable alternative, particularly when retaining an expert would be at the Government's expense, given Mr. Baez's indigent status. Mr. Baez is *not* seeking expert testimony on PTSD generally—he is seeking the testimony of his diagnosing and treating physician as to the tests she personally administered and her personal knowledge of his medical condition.

Ms. Welu, on the other hand, would similarly testify from her personal knowledge regarding Mr. Baez's substance abuse disorder and treatment. We also take issue with you not yet speaking with Ms. Welu to determine your position on Mr. Baez's request that she testify. After submitting a release of information form, Ms. Welu quickly made herself available to discuss this case with us and the extent of her personal knowledge. That you have been unable to speak with Ms. Welu in the 34 days since we submitted our request indicates only inexcusable delay on your part.

Please let us know if this changes your assessment at all. Otherwise, we will file our motion to compel in the morning.

Best,

Caitlin L.D. Hull

Attorney

P: 612.492.6773 F: 612.677.3299 C: 952.406.2981
WWW.DORSEY.COM :: MINNEAPOLIS

From: Dovel, Michael E. (OGC) <Michael.Dovel@va.gov>
Sent: Wednesday, January 2, 2019 4:42 PM
To: Hull, Caitlin <hull.caitlin@dorsey.com>
Subject: RE: U.S. v. B_____ -- Touhy Request

Ms. Caitlin,

After consulting with Dr. Andrews-Wiebusch and with attorneys in this office, I am recommending that we do not offer Dr. Andrews-Wiebusch testimony. She has nothing to offer in terms of a fact witness, other than that which already exists in the medical record. It is a generally accepted notion in the medical field that PTSD can influence drug use, drugs being a mechanism by which one would attempt to avoid the symptoms of PTSD. To this general fact you can hire any expert witness. Dr. Andrews-Wiebusch was not involved in any of the drug treatment programs and did not address any

of the issues of Mr. B's personal drug use, other than to occasionally state that drug use can be used to avoid PTSD issues.

I was not able to communicate with the social worker. I did find out that she was a person who is involved in Mr. B's recent drug rehabilitation, as well as a Dr. Silversmith.

Sincerely,

Michael Dovel

From: hull.caitlin@dorsey.com [<mailto:hull.caitlin@dorsey.com>]
Sent: Wednesday, January 02, 2019 12:45 PM
To: Dovel, Michael E. (OGC) <Michael.Dovel@va.gov>
Cc: zayed.rj@dorsey.com; Rudie, Jason (OGC) <Jason.Rudie@va.gov>
Subject: [EXTERNAL] RE: U.S. v. Baez (D. Minn. No. 17-Cv-135-ADM-DTS) - Touhy Request

Thanks, Michael.

As an update, the judge has granted our motion for subpoenas (attached), which we will serve shortly. We also have our motion to compel prepared, and intend to file by the close of business unless we hear back from you prior to then.

Caitlin L.D. Hull

Attorney

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I will attempt to get something resolved today - communicating with providers and with our attorneys

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